

In the Matter of)
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Rates for Interstate Inmate Calling Services) WC Docket No. 12-375
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20402349v1

The professionals who run and operate correctional institutions in our nation do not oppose the most recent demands of the *Wright Petitioners* based on a narrow reading of the FCC’s authority under 47 U.S.C. § 276 or America’s historic commitment to a scheme of cooperative federalism. Rather, they are concerned that the new \$0.07/min. proposal would effectively return the ICS marketplace “to the stone ages” — that their jails and prisons would be less secure, without automated call systems and, correspondingly, with fewer crimes prevented and solved than enabled by current ICS technology. Correctional facilities rely heavily on the advances made in the ICS industry and are concerned that price regulation, considered without regard to their budgetary and security obligations, would make the provision of these important and powerful “outsourced” government services uneconomic as a business matter.

The proposed rate cap of \$0.07 per minute effectively subjects ICS providers to a form of rate-of-return regulation that this Commission no longer applies even to dominant local exchange carriers (“LECs”). Given steadily decreasing equipment and transport costs in the telecommunications industry, including centralized ICS platforms and VoIP transmission, the rationale underlying the proposed cap — even if constrained to interstate calls — would (i) all but eliminate incentives for innovation, (ii) force the termination of free and complementary services on which correctional departments and offenders both rely,³ from call recording to booking, grievance and commissary IVR systems, and (iii) reduce margins for ICS providers so severely that many, if not most, firms would as a rational business matter be forced to consider abandoning the market in relatively short order.

Telmate does not offer these dire predictions as an opponent of reasonable rates for inmates, their families and friends. To the contrary, in its relatively short existence our company

³ Free calls alone comprise a hefty 21% of all call minutes and 30% of ICS calls from county correctional facilities. Telmate Comments at 4.

has pioneered new services, a “postalized” rate structure offering lower ICS rates in many jurisdictions, and cutting-edge features like remote kiosks for prepaid and debit services that offer a level of convenience and customer service previously lacking in the industry. We believe the evidence is uncontradicted that lower ICS prices stimulate usage, increasing both inmate connectivity *and* correctional system revenues.⁴ Yet it is evident from an examination of rates for telecommunications services in the United States, whether wireless, payphones, or long-distance and local wireline calling, that a \$0.07 per-minute rate without any ancillary charges is markedly lower than the prices available in the marketplace for *any other type* of communications service today. Even leaving aside the issues of site commissions and exclusive contracts — both of which inmate advocates also want to prohibit or preempt — it is not possible to square the new proposed cap with the salutary objectives of the *Notice* and Section 276 itself. “Reasonable” rates under the Communications Act must be fair to both users and carriers, just as “fair compensation” for payphones must also be fair to those paying dial-around compensation.⁵

In the reply comments that follow, Telmate presents a look at the business economics of the ICS industry, which review demonstrates that the entry and expanded ICS services increasingly available over the past two decades are now at risk. No one interested in inmate calling or correctional institution operations should be prepared to accept the very real danger that ICS services could be sent back in time to an era where phones, calling opportunities and services like voicemail were unavailable and corrections officers had to personally monitor every call by every inmate. That is, unfortunately, the necessary and all but inevitable consequence of

⁴ Telmate Comments at 12-14. The data Telmate supplied directly refute the uncorroborated suggestion by Global Tel*Link that lower ICS rates “are unlikely to have a significant impact on call volumes.” Global Tel*Link (“GTL”) Comments at 18.

⁵ “Section 276 requires us to ensure that per-call compensation is fair, which implies fairness to both sides.” *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Fifth Order on Reconsideration, 17 FCC Rcd. 21274, 21302-03 ¶ 82 (2002).

the new \$0.07/min. rate cap proposal aired for the first time just last month after nearly 10 years of debate before and inquiry by this Commission into the ICS market.

DISCUSSION

Telmate's initial comments focused on a core set of issues, in particular the shifting mix of call types in inmate services and the effect of that development on interstate ICS rates.⁶ These reply comments in turn address the economics of the ICS industry and the consequences of that business reality on the Commission's range of possible outcomes under the *NPRM*.

I. THE WRIGHT PETITIONERS' NEW \$0.07 PER-MINUTE RATE CAP IS FUNDAMENTALLY IN CONFLICT WITH THE BUSINESS ECONOMICS OF THE ICS MARKETPLACE

The \$0.07 per minute inmate services rate cap proposed by the *Wright Petitioners* in their 2013 opening comments⁷ is fundamentally in conflict with the business economics of the ICS market and must be rejected. A basic understanding of the modern-day requirements for inmate communications shows unequivocally that ICS services are vastly different, more complex, with much greater security and cost requirements than *any* public telecommunications system. Regardless of this reality, the *Wright Petitioners* request that the price of inmate communications be held lower than *any* other public telecommunications service. The Commission should not impose the requested cap.

The primary concern of correctional officials is the safety and security of their facilities and inmates, a mission they must achieve within tight budgetary restrictions. Inmate communications are fraught with security risks. While the vast majority of conversations between inmates and those on the outside are fairly typical and mundane, many are not. The officers tasked with operating jails and prisons, then, must find ways to balance the inmates' desires to speak with

⁶ Telmate Comments at 8-10; *accord*, Pay Tel Comments at 3-9.

⁷ Wright Petitioner Comments at 17-25 & Exh. C.

their friends and family members with the higher governmental priority of reducing violence and unlawful acts, both within and outside the correctional facilities. If they were forced to choose between allowing inmates to communicate without any of the modern technological advances and not allowing any communications at all, correctional officials would choose the latter.

Technological advances over the past 10-15 years have allowed correctional officials to both increase security and, simultaneously, inmates' access to means of communication. One of the greatest advances has been the advent of recording and archiving all inmate phone calls. This has had two salutatory effects: (1) reduced need for facility staff to listen to every call live, which, in turn, (2) has allowed inmates to make more phone calls.

The ability to record and archive calls and the other technological advancements upon which correctional officials rely are not free. It costs money to pay for the security features. What may seem passé today was, at one point, groundbreaking. And while the costs associated with older technologies certainly diminish over time, they never are eliminated. Additionally, ICS providers — in particular, Telmate — are investing heavily in researching and developing new technologies that will increase the security features of inmate communications. With greater security comes expanded access to more and new ways to communicate, which is a boon to inmates and their friends and family members. But if the proposed \$0.07/min rate cap were imposed, then ICS providers would have neither the means nor the incentive to create these next-generation technologies. The result of ICS providers abandoning their R&D efforts will be less secure jails and prisons, reduced public safety, and fewer means of communication for inmates.

With the above analysis as a point of reference, if the Commission were to compare the cost structure of the ICS market to others, the most analogous would be the payphone industry. There, all costs associated with installing and maintaining equipment are borne by the providers,

an unusual circumstance in today's communications environment. The only cost, from a user's perspective, is for the time he or she wishes to spend on the telephone. (Obviously, payphone providers amortize their equipment expenses and include the taxes and regulatory fees that must pay as part of the call's price, while the flat rate cost is transparent to end users.) Additionally, the payphone market is openly competitive, with different providers often within steps of one another. Still, the price of an average long-distance call placed from a payphone is \$0.25 per minute, and it is often higher.⁸ That is more than 250% higher the rate proposed by the *Wright Petitioners*.

While the payphone market is analogous in some respects to that for ICS services, there are a number of differences. Payphones offer practically none of the ancillary benefits provided to correctional facilities and the inmates housed therein. Among the value-added services offered by ICS firms are (i) live, United States-based operators available 24-hours a day, seven days a week, 365 days a year; (ii) access to toll-free hotlines for reporting concerns about an inmate's health and well-being, and (iii) for government officials, a suite of tools that that they have universally hailed as essential for making correctional facilities safer, more secure and for reducing crime.⁹

The prepaid cellular market also provides another basis for comparison. In contrast to the ICS market, prepaid cellular subscribers themselves bear the expense of providing and maintaining their CPE. If a mobile phone is dropped and broken, the seller of the prepaid minutes is not obligated to replace or repair the device free of charge. Even without bearing

⁸ See, e.g., http://www.apscservices.info/tariffs/2916_ppts_1.pdf.

⁹ See also NCIC Comments at 2-3; PayTel Comments at 9-11.

equipment costs, however, the average price of prepaid wireless services (again devoid of any of the value-added benefits of an ICS) is \$0.20 per minute.¹⁰

The Commission must as an economic matter reject the newly proposed \$0.07/min. cap on inmate calls. The proposed price is not based on business reality. No provider could economically continue to provide the same level of service and value-added features to all users if this cap were imposed. Mandating such a rate cap would cause much more actual harm than any good it may be hoped to do.

II. THE COMMISSION SHOULD INCLUDE SITE COMMISSIONS AS A LEGITIMATE COST OF DOING BUSINESS

The Commission should also reject the suggestion that, in connection with the proposed \$0.07/min. cap, it prohibit or exclude any “ancillary” fees, including site commissions.¹¹ No doctrinal or factual basis exists for the FCC to decline to recognize site commissions paid by ICS providers as a legitimate cost of doing business. While, as Telmate noted, those commission percentages have increased markedly in recent years,¹² which in turn has created pressures for both carrier cost efficiencies and rate increases, the concept that such payments reflect “shared monopoly rents” is irrelevant to their rate-setting implications.¹³ Just as a hot dog vendor at Ronald Reagan Washington National Airport pays a concession fee to WMATA for the privilege to operate there,¹⁴ or private contractors selected to build and operate highway and other capital improvements traditionally provided by government remit a portion of their revenues for the

¹⁰ Boost Mobile, Pay-as-You-Go Plan, <http://www.boostmobile.com/shop/plans/pay-as-you-go/>.

¹¹ Wright Petitioners Comments at 3, 17.

¹² Telmate Comments at 6-8. *Accord*, GTL Comments at 10 (“the size of commissions have [sic] increased substantially since the First Wright Petition”).

¹³ Wright Petitioners Comments at 9, 21-23. *See* GTL Comments at 12-13 (FCC’s 1999 discussion of “location rents” for payphones “is no longer a viable analogy based on the evolution of inmate telephone technology and the near death of the payphone industry in the intervening period”).

¹⁴ Washington Metropolitan Area Transportation Authority, <http://www.metwashairports.com/>.

right to conduct business,¹⁵ ICS site commissions are a funding mechanism for privatizing services that state, county and local governments would otherwise have to construct, offer and operate themselves, at general taxpayer expense.

From a “just and reasonable” rate perspective, denoting commission payments by ICS providers as “profit” contradicts the fact that ICS operators *never realize any net revenue from the portion of rates paid to correctional facilities as commissions*. The obvious corollary is that, just as prices for airport hot dogs and interstate highway rest area fast food are higher than market rates elsewhere, because the private business owners face additional expenses payable to a government entity, so too must ICS firms cover the cost of site commissions in their service rates to end users. But that price differential, by most accounts, is more than offset by the ability to access the goods and services of privatized concession operations — an effect equally true for Dulles Greenway¹⁶ toll payers, I-95¹⁷ diners, and inmate callers.

Regardless, even for ratebase-regulated public utilities, the United States legal system does not disregard or disallow costs and investments made by such private firms except in the very rare case they were not “prudently” incurred.¹⁸ Neither the *Wright Petitioners* nor the

¹⁵ See U.S. Department of Transportation, Federal Transit Administration, REPORT TO CONGRESS ON THE COSTS, BENEFITS AND EFFICIENCIES OF PUBLIC-PRIVATE PARTNERSHIPS FOR FIXED GUIDEWAY CAPITAL PROJECTS, at 1 (Dec. 2007), http://www.fta.dot.gov/documents/Costs_Benefits_Efficiencies_of_Public-Private_Partnerships.pdf (“As the growth in traditional transportation revenue sources, such as gasoline taxes, continues to decline and operating deficits increase, transportation agencies are increasingly looking for new sources of revenue to leverage funding and to improve project feasibility and cost-effectiveness. One of the most successful methods employed by other infrastructure sectors to improve project feasibility and cost-effectiveness and generate revenues is the use of public-private partnerships (PPPs). In addition to cutting costs and raising new revenue, PPPs can significantly reduce the time it takes to complete a capital project, can help the public sector allocate risks to the private sector that the private sector is better able to manage and can improve the quality of the public’s infrastructure.”).

¹⁶ <http://dullesgreenway.com/>.

¹⁷ See P. Samuel, *Maryland toll authority to sign 35 year \$180m/\$198m PV concession on I-95 Kennedy Hwy service plazas*, Toll Road News, Jan. 26, 2012, <http://www.tollroadsnews.com/node/5721>.

¹⁸ “Rate-of-return regulation is based directly on cost. Firms so regulated can charge rates no higher than necessary to obtain ‘sufficient revenue to cover their costs and achieve a fair return on equity.’” *National Rural*

NPRM, however, is able to cite a precedent in which the FCC dictated that some category of costs actually incurred by a regulated LEC or IXC was declared invalid as a locational profit, even under full rate-of-return regulation for monopoly Bell Operating Companies. And since the advent of incentive and other alternative regulatory models nearly 25 years ago, cost categorization and recovery are irrelevant to rate regulation. The difference, of course, is that in LEC “price cap” regulation, the initial rates were based on historical, embedded costs (fully distributed costs) and an authorized rate of return for each carrier.¹⁹ Unless and until the FCC were to undertake the massive job of conducting formal rate cases for each ICS provider at each correctional facility location, it has no comparable safe harbor against challenges to any rate caps flowing from this proceeding as confiscatory.

III. THE COMMISSION SHOULD REQUIRE DEBIT AND PREPAID CALLING OPTIONS TO BE MADE AVAILABLE TO INMATES

No objective observer can reconcile the opposition of Securus and Global Tel*Link to a requirement for the provision of debit and prepaid services with the realities of the ICS business. It is undeniable that billing and collection costs for collect calls are the basic driver of their

Telecom Assn. v. FCC, 988 F.2d 174, 177-78 (D.C. Cir. 1993), quoting *Policy and Rules Concerning Rates for Dominant Carriers*, Further Notice of Proposed Rulemaking, 3 FCC Rcd. 3195, 3211 (1988). As a leading telecommunications regulatory treatise observes with some understatement, “[t]he last category of costs [*i.e.*, imprudent] can be particularly contentious and often involves protracted regulatory proceedings.” S. Benjamin, D. Lichtman, H. Shelanski and P. Weiser, *Telecommunications Law and Policy* at 748-49 (2d ed. 2006). Even so, this Commission recognized long ago that “it is prudent to implement regulatory systems that are better able than rate of return to operate effectively in an environment marked by competition and technological change.” *Policy and Rules Concerning Rates for Dominant Carriers*, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd. 695, ¶¶ 89-91 (1991). Excluding ICS site commissions as provider costs in a new rate cap applicable specifically and only to inmate services would represent an unsustainable mashup of the worst aspects of both ratebase and incentive regulation.

¹⁹ The FCC’s price cap scheme for LECs also “enable[d] a firm to raise the price of a product or service, so long as the firm offsets any increase for one service with decreases for others within the comparison group selected by the regulator.” *National Rural Telecom Assn.*, 988 F.2d at 182. The rate cap proposed by the Wright Petitioners and contemplated in the *NPRM* would apply, in contrast, only to a single service rather than a larger “basket” of price capped services.

higher prices.²⁰ GTL's suggestion that debit and prepaid calling services would not "exert downward pressure on collect calling rates" is nonsensical,²¹ because the availability of lower-priced alternatives to collect calls will, as a business matter, require ICS providers to reduce their collect calling rates or sacrifice nearly that entire revenue stream. Securus' curious implication that the provision of debit and prepaid services for ICS "lies in the discretion of the resident correctional authority" seems inapplicable as to interstate services; unlike the choice to finance prisons and jails via site commissions, the police power of state and local governments is not implicated by the type of communications service available to inmate populations.²²

Telmate believes the record is clear that debit and prepaid calling alternatives are pro-competitive developments that have led to reduced-cost calling services for inmates. While the larger incumbents are loathe to admit it, their calling systems and ICS platforms, especially at smaller customer locations, are frequently old or obsolete, and cannot support services other than collect calls. That is the real reason these firms oppose a debit and prepaid service mandate, but it is invalid as a public policy matter.

IV. PROHIBITING MULTIPLE PER-CALL CHARGES FOR DROPPED ICS CALLS IS A REASONABLE REFORM IN VIEW OF TECHNOLOGICAL PROGRESS

Dropped calls occur from time-to-time with telephone conversations involving mobile phones when, for whatever reason, the handoff between cell towers is not completed properly.

Telmate agrees with the *Wright Petitioners* that prohibiting multiple per-call charges for dropped

²⁰ Telmate Comments at 11-12; GTL Comments at 20-21.

²¹ GTL Comments at 22. GTL argues that the FCC cannot require debit and prepaid calling because it lacks power to regulate billing and collection for inmate calls, as B&C services were detariffed decades ago. *Id.* at 23. That is obviously incorrect because the FCC has not proposed to regulate the activity of billing and collection, which remains a non-telecom service, but rather provision of the underlying telecommunications service itself to inmates and parties called from correctional facilities.

²² Securus Comments at 21.

calls is a reasonable reform and one that the Commission should adopt.²³ Because of technological advances pioneered by Telmate and its commitment to providing live, United States-based customer service representatives for its customers,²⁴ this is a practice that Telmate has already adopted. It certainly seems reasonable that the potentially abusive practice be eliminated entirely.

In most facilities where Telmate operates, when an inmate believes that his or her call has been dropped, the inmate simply leaves a voicemail with Telmate's customer service representatives by dialing our customer service line. All inmate complaints are reviewed by our customer service representatives; when it is established that a call was dropped, then the inmate's account is credited the price of the call. In other Telmate facilities, all calls are on a postalized rate, with no per-call charge to begin with. In the event of a dropped call, the call can be resumed without any additional charge for doing so. Finally, in regard to collect calls, Telmate connects collect calls only to landlines, and, since such calls do not get dropped, there is no concern over multiple per call charges.

Some Respondents claim that many dropped calls are the result of improper three-way calling.²⁵ Telmate does not automatically disconnect suspected three-way calls; rather, all such calls are flagged and reviewed by live operators. However, it would seem reasonable for ICS providers that automatically disconnect suspected three-way calls to offer inmates a refund if a

²³ Wright Petitioners Comments at 24-25; *NPRM* ¶¶ 18, 40.

²⁴ The costs associated with providing live customer service representatives 24 hours a day, 365 days a year are significant. Nevertheless, Telmate is committed to providing its customers with the best possible service, and we do not see how we could do so without making this significant financial commitment on our part.

²⁵ Three-way calls by for inmates are prohibited by the correctional facilities for security concerns, to wit, not being able to determine the location, identity, or phone number of the third party. Telmate has taken the position to not automatically disconnect such calls. Rather suspected calls, as mentioned are reviewed. In the event that there is an unauthorized third party on the call, the inmate is billed for the second call. Additionally, correctional officials are notified of the third-party call so that it may be reviewed.

disconnect was in error. Whether that rises to the level justifying national regulation by the FCC is a matter we leave in the Commission's able hands.

CONCLUSION

The Commission should continue its historical practice of letting correctional facilities determine and market participants determine the pricing of inmate telephone calls. In the event that it elects to mandate a rate cap, the Commission must be cautious not to set a cap or structure that makes providing inmate calling services economically unfeasible. The most recent proposal by the *Wright Petitioners* is for a rate that is lower than the price of almost any other telecommunications service offered today. Adopting the proposed cap would necessarily force the termination of a host of free and complementary services that are beneficial to inmates, their friends and family members, and government officials. The proposed rates would eviscerate margins for ICS providers so severely that many, if not most firms — including Telmate — would be forced to consider abandoning the market. If the Commission decides to enact price controls in the inmate communications market, Telmate urges the Commission to be mindful of the market's extremely unique nature.

Respectfully submitted,

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